In the Supreme Court of the United States

October Term, 1963

No. 71

FEDERAL POWER COMMISSION, PETITIONER

v.

SOUTHERN CALIFORNIA EDISON COMPANY AND PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL POWER COMMISSION

In the court of appeals, respondents argued a number of issues which were not reached below (see Edison's Brief to this Court, pp. 2–3). The Commission, in light of this Court's usual practice,[1] has

[1] The usual, though not invariable, practice of this Court has been to refrain from deciding issues, which, although they are part and parcel of the litigation, have not been reached in the lower federal courts. See *O'Leary* v. *Brown-Pacific-Maxon*, 340 U.S. 504, 508; *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 497; *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151, 175; *Fource Glass Co.* v. *Transmirra Corp.*, 353 U.S. 222, 229; *Black* v. *Magnolia Liquor Co.*, 355 U.S. 24, 27. Only recently in *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, the respondent vigorously urged that this Court uphold, on grounds not decided below, a court of appeals'

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confined itself to the single issue reached by the court below, *i.e.*, whether the Commission's exercise of its authority under Section 201(b) of the Federal Power Act to regulate sales of electric energy at wholesale in interstate commerce depends in each case upon a determination of whether there is a "national interest" in the sale arising from a conflict of state interests. Our contentions on this issue are fully stated in our main brief.

In No. 73, however, the petition of the City of Colton, California, urged this Court to consider, in addition, the question whether the Federal Power Commission is precluded from regulating Edison's sale for resale to Colton by provisions of the Boulder Canyon Project Act. The grant of certiorari was not limited and that question has now been briefed by Colton and both of the respondents.

Since disposition of the Boulder Canyon Project Act question may be said to involve a well defined legal issue, we do not urge that it would be inappropriate for the Court to consider it—especially since we believe that earlier decisions of this Court are dispositive. Accordingly, we will briefly state the Commission's position on this issue, which is in general agreement with that of the City of Colton.

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judgment setting aside an agency order. The Court declined to do so, stating (p. 542) that "it would be unwise for us to grapple with these intricate problems, the solution to which requires a careful examination of a voluminous record, before they have been dealt with by the Court of Appeals." It also observed, however, that consideration of alternative grounds would be an "appropriate course of action" (*ibid.*) in other circumstances.

The Public Utilities Commission of the State of California (but not the respondent company) has briefed an additional point—that the decision below may be affirmed on the alternative ground that the record contains no substantial evidence to support the Commission's findings that interstate energy is actually received by Colton. Since disposition of factual and highly technical questions involving studies of complex electrical systems would, as in *Anheuser-Busch, Inc., supra,* require examination of a voluminous record, we are confident that this Court will not choose to consider it in advance of the court of appeals, and we shall not burden the Court by discussing it.

As we shall also show, California's suggestion of mootness (Br. p. 4) is plainly groundless if only because it ignores the question of the legality of the rates already collected.

1. The Commission was clearly correct in holding (R. 844–848) that Section 6 of the Boulder Canyon Project Act (Colton Brief, p. 20–21) does not impliedly limit the Commission's otherwise comprehensive regulatory authority over sales at wholesale in interstate commerce under the subsequently enacted Part II of the Power Act. As shown by Colton in its brief in No. 73 (pp. 9–16), Section 6 of the Boulder Canyon Project Act, enacted in 1928, was *at most* intended, in the absence of any general federal regulatory control over interstate wholesale power rates, to give the Secretary of the Interior regulatory powers with respect to the resale by purchasers of energy

produced by that project corresponding to those given the Federal Power Commission by Sections 19 and 20 of the 1920 Water Power Act with respect to the output of the hydroelectric projects licensed under that Act. Title II of the Public Utilities Act of 1935, adopted as Parts II and III of the Federal Power Act, added an entirely new scheme of regulation to the Federal Water Power Act of 1920—one based on federal jurisdiction over interstate commerce in the *electric energy,* rather than federal jurisdiction over the *navigable waters and public lands of the United States* (upon which both Section 20 of the Power Act and Section 6 of the Boulder Canyon Project Act were based). Since the regulatory scope of Section 6 was intended to be the same as that of Section 20,[2] whether administered by the Secretary of the Interior or the Commission, the decisions of this Court that Federal Power Commission assertion of jurisdiction under Part II of the Power Act is not *limited* by the provisions of Section 20 require the same result with respect to Section 6 of the Boulder Canyon Project Act. See *United States* v. *Public Utilities Commission,* 345 U.S. 295; *Pennsylvania Water and Power Co.* v. *Federal Power Commission,* 343 U.S. 414; see also *California Electric Power Co.* v. *Federal Power Commission,* 199 F. 2d 206 (C.A. 9), certiorari denied, 345 U.S. 934 (see Colton Br., pp. 11–15).

[2] In December 1925, Mr. O. C. Merrill, Executive Secretary of the Federal Power Commission, in written comments on an early bill for development of the Colorado River basin (see *Hearings on Protection and Development of the Colorado River Basin before Senate Committee on Irrigation and Recla-*

Respondents' contention (Edison Br. p. 68) that an implied exception should be read into the Commission's Part II jurisdiction on the ground that Congress deliberately chose to give the Secretary of the Interior, rather than the Commission, rate regulatory authority over resales of power generated at Boulder Canyon is ill conceived. It is true, of course, that the Boulder Canyon Project Act was extremely controversial.[3] Indeed, the passage of the Boulder

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mation, 69th Cong., 1st Sess., pp. 890–897), listed "[c]ertain public safeguards expressly set forth in the Federal water power act, and which are not made applicable under the" bill then before the committee (S. 1868, 69th Cong.). The fifth item of the list was: "There is no requirement that any Federal agency shall, in absence of State regulation or of interstate agreement, have any jurisdiction to regulate rates, services, or security issues of lessees, whether the power developed be or be not transmitted in interstate commerce."

On April 14, 1926, a revised Senate committee print included for the first time the language which is now found in Section 6 that the "Secretary of the Interior shall prescribe and enforce rules and regulations conforming with the requirements of the Federal Water Power Act, so far as applicable, respecting * * * control of rates and service in the absence of State regulation or interstate agreement * * *." See *Hearings on H.R. 6251 and H.R. 9826 before House Committee on Irrigation and Reclamation*, 69th Cong., 1st Sess., p. 116. A comparison of the full sentence of Section 6 of which this language is a part, as added in that bill (which remained unchanged in the enacted version except for the addition of the phrase "recapture and/or" after the reference to expropriation of excessive profits) with Mr. Merrill's listing of public safeguards omitted from the earlier proposed bill shows unmistakably that Section 6 was intended to incorporate those safeguards, which then existed in the Federal Water Power Act with respect to Part I *licensees*.

[3] See, *e.g.*, Sen. Rep. No. 654, 69th Cong., 1st Sess.; H.R. Rep. No. 1657, 69th Cong., 2d Sess.; H.R. Rep. No. 918, 70th Cong., 1st Sess.; Sen. Rep. No. 592, 70th Cong., 1st Sess.

Canyon Project Act in 1928 was the culmination of years of consideration and disagreement,[4] much of it stemming from the steadfast opposition of Arizona (see *Arizona* v. *California*, 373 U.S. 546, 559–560) and from opposition to "public power" development.

During the course of this consideration, the Commission (then consisting of the Secretaries of War, Interior and Agriculture), in commenting on an early version of the bill, opposed federal development of power at Boulder Canyon on the ground that private development by licensees under the 1920 Federal Water Power Act had been a marked success and that no departure from this approach appeared to be justified. See *Hearings before the House Committee on Irrigation and Reclamation in H.R. 2903*, 68th Cong., 1st Sess. at 1002.[5] If the Commission's opposition to public development and operation of the project had prevailed, it would have been able to

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[4] See, *e.g.*, *Hearings on H.R. 11449 before the House Committee on Irrigation of Arid Lands*, 67th Cong., 2d Sess.; *Hearings on Protection and Development of the Colorado River Basin before the Senate Committee on Irrigation and Reclamation*, 69th Cong., 1st Sess.; *Hearings on H.R. 6251 and H.R. 9826 before House Committee on Irrigation and Reclamation*, 69th Cong., 1st Sess.; *Hearings on S. 728 and S. 1274 before Senate Committee on Irrigation and Reclamation*, 70th Cong., 1st Sess.; *Hearings on H.R. 5773 before House Committee on Irrigation and Reclamation*, 70th Cong., 1st Sess. See *The Hoover Dam Documents*, H. Doc. 717, 80th Cong., 2d Sess., pp. 32–43, for a more complete listing of the legislative history of the Boulder Canyon Project Act.

[5] The Commission's letter was quoted in Part II of the report on which Edison relies (Br. p. 68). See H.R. Rep. No. 1657, 69th Cong., 2d Sess., Part 2 (Minority Views of Mr. Leatherwood) pp. 15–18.

exercise the limited rate regulating authority existing under Part I of the Water Power Act with respect to licensees. But, contrary to Edison's assertion (Br. p. 68), the thrust of the Commission's position was its opposition to any federal construction of a dam at Boulder Canyon, and not an attempt to obtain for itself rate regulatory authority of the type then existing under the Power Act in the event of federal construction.* The very fact that the sponsor of the bill believed that, under the law enacted, the Commission would provide regulation protecting consumers (see Colton Brief pp. 9–10) negates Edison's claim that Congress, for some unexplained reason, had a design to prevent the Commission from regulating sales of Boulder Canyon power by private utilities in all circumstances.

Nor is there basis for Edison's suggestion (Br. p. 69) that Part II of the Power Act cannot control because of the failure of Congress, when passing the Boulder Canyon Project Adjustment Act, 54 Stat. 774, as amended, 43 U.S.C. 618–618o, in 1940, to repeal the portion of Section 6 of the Boulder Canyon Project Act here at issue. The 1940 Act, which has the effect of repealing inconsistent provisions of the Boulder Canyon Project Act (although no provisions of the earlier Act were stricken as such), modified the method by which the Secretary of the Interior was to fix the rates at which *he* sells Boulder Canyon

* As this Court pointed out in *United States* v. *Public Utilities Commission*, 345 U.S. 295, 308, n. 14, despite the provisions of Section 20 "in fact substantially nothing in [the] direction [of rate regulation] had been attempted, at least by 1930."

energy (see H. Rep. No. 2328, 76th Cong., 3d Sess.), but had no bearing upon the regulation of subsequent sales. Indeed, there was no occasion in 1940 for Congress to consider the need for regulation of sales at wholesale in interstate commerce since Congress had given the Commission plenary power over such sales in Part II of the Federal Power Act. In parallel circumstances, this Court has held that the Commission's Part II jurisdiction takes precedence over its potential jurisdiction under Section 20 of the Power Act, even though the provisions of that Section were not excised in 1935, when other portions of Part I of the Power Act were modified and Part II added. See *United States* v. *Public Utilities Commission,* 345 U.S. 295; *Pennsylvania Water and Power Co.* v. *Federal Power Commission,* 343 U.S. 414. Edison's argument here stands on no better footing.[7]

2. Contrary to California's suggestion (Br. p. 4), this case cannot be moot. For even assuming *arguendo* that Commission jurisdiction could terminate subsequent to the date of the Commission's order under review because dominant flows on a particular

[7] Edison also (Br. p. 70) seeks support from a number of laws which authorize the Commission to approve rates for federally developed power at some, but by no means all, other federal projects. The provisions to which respondent refers relate to initial sales of project power by the United States which would otherwise be exempt from Commission jurisdiction under Section 201(f) of the Power Act, 16 U.S.C. 824(f); they do not refer to *later* sales for resale of federally generated power by private utilities—the only type of sales at issue here.

line had been temporarily reversed (but see our main brief, p. 33, n. 18), the Commission's jurisdiction for the prior period, *i.e.*, back to July 1, 1954, would still present a very live controversy; it is the premise of Colton's claim that it is entitled to recover amounts collected in excess of the legal rate. During that past period Edison failed to file its rate increases with the Federal Power Commission and collected rates higher than those in effect on July 1, 1954, on the basis of purportedly lawful filings made with the California Commission. Although no reparations may be ordered under the Power Act on the ground that past rates were unreasonably high, this Court's decision in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 337, makes it plain that a company is obliged to make restitution of amounts collected in excess of the legal rate.

Respectfully submitted.

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